

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON AT TACOMA

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4 EMILY TORJUSEN, )  
5 Plaintiff, ) 3:18-cv-05785-BHS  
6 v. ) Tacoma, Washington  
7 NATIONAL RAILROAD PASSENGER )  
8 CORPORATION d/b/a AMTRAK, ) March 7, 2022  
9 Defendant. ) Pretrial  
Conference  
)

10  
11 VERBATIM REPORT OF PROCEEDINGS  
12 BEFORE THE HONORABLE BENJAMIN H. SETTLE  
13 UNITED STATES DISTRICT JUDGE  
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MORNING SESSION

MARCH 7, 2022

THE CLERK: Good morning. This is in Torjusen versus Amtrak, Cause No. C18-5785BHS.

Counsel, please make an appearance for the record.

MR. PETRU: Anthony Petru on behalf of the plaintiff. I will change my name, change the identification.

MR. LEVY: Scott Levy on behalf of plaintiff.

MR. GRUBE: Joseph Grube on behalf of plaintiff.

MR. BONVENTRE: John Bonventre on behalf of the defendant.

MR. YATES: Andrew Yates on behalf of defendant.

THE COURT: Good morning. That mic is working, is it? Can you hear?

MR. BONVENTRE: Yes, Your Honor.

THE COURT: We are working off the audio in the courtroom and not off the computer. That is why I asked.

Again, good morning, everyone. This matter is a hearing on the pretrial conference. Trial is scheduled to begin the 29th of this month. It will be an in-person trial. That moots Amtrak's objection to a Zoom trial.

I will talk about the procedures during trial here. First, I want to take up the motions in limine. The plaintiff's first motion in limine is to preclude expert testimony not disclosed. That's unopposed and granted.

1 Second is to preclude reference to collateral source.  
2 This issue has arisen in other Amtrak derailment cases in  
3 this court. Amtrak does not object to precluding evidence  
4 regarding third-party compensation. In prior cases, Amtrak  
5 has admitted liability and has paid all known medical bills  
6 of plaintiffs. If that is the case here, or it intends to  
7 pay but not all bills have been paid, then I have allowed, in  
8 prior cases, for evidence regarding the payment of medical  
9 bills. Usually that is done, and it has been done more than  
10 once through stipulation. Is that what the parties intend to  
11 do here? Are there outstanding medical bills?

12 MR. PETRU: Your Honor, this is Anthony Petru. There  
13 are some outstanding, unpaid medical bills. If Amtrak  
14 intends to see that those be paid, I would imagine we would  
15 enter a stipulation just -- merely indicating the past bills  
16 have been paid or been satisfied without going into any  
17 further unnecessary detail.

18 THE COURT: That's what we've done in the past. It  
19 does indicate they are paid by Amtrak in furtherance of their  
20 admission of liability.

21 MR. PETRU: Your Honor, we have an objection to that  
22 because the fact that Amtrak has paid for it is irrelevant  
23 and should be irrelevant to the jury. There is no reason why  
24 the jury needs to know who paid for it, other than Amtrak's  
25 attempt to ingratiate themselves with the jury on behalf of

1 their benevolence. If this (inaudible) in cases not properly  
2 brought forth to the jury, and this is one of them, that  
3 Amtrak paid it, than an insurance company paid it, or some  
4 third party paid it, or Ms. Torjusen's parents or she paid  
5 it. It is irrelevant who paid it. We are not seeking from  
6 the jury the reasonable value of those paid medical bills.

7 Our position is the stipulation should indicate that they  
8 have been paid, and there is no plausible relevant reason why  
9 the fact that Amtrak has or will pay those outstanding bills  
10 on the eve of trial is relevant.

11 MR. BONVENTRE: Judge, on behalf of Amtrak, we would  
12 ask for the same stipulation that we have entered in all the  
13 prior trials.

14 THE COURT: We will do that. It may seem remote, but  
15 the jury, in making a determination as to award of damages,  
16 may have an idea that somehow or another they are supposed to  
17 pay for medical bills. I don't see unfair prejudice at all.  
18 It is consistent with the admission of liability. It makes  
19 that clear to the jury. A case has not been made as to how  
20 plaintiff is somehow prejudiced by that. The stipulation  
21 form that's been used in the past should be used in the  
22 future or in this case here.

23 No. 3, preclude reference to the time or manner of  
24 attorney retention. That's unopposed and granted.

25 No. 4 is preclude location of attorney's law firm.

1 Unopposed and granted.

2 No. 5 is preclude reference to tax on recovery. As to the  
3 time of the filing of the Complaint, it is my understanding  
4 plaintiff was a resident of the state of Washington, which  
5 does not have an income tax. I have, when asked for an  
6 instruction on non-taxability of the award, given it. I will  
7 give it here unless somebody can show to me that there is  
8 some tax liability possibility.

9 MR. PETRU: I will try to keep my perfect batting  
10 average in place here. We do oppose that instruction. If I  
11 can share with the Court anecdotal experience. I have  
12 represented railroad workers in FELA cases. This is my fifth  
13 decade of doing it. Every case that we have handled against  
14 Amtrak, Santa Fe, Northern Pacific or any other railroad, the  
15 fact that the FELA has been established by Congress as a  
16 railroad employee's sole remedy in an FELA case is something  
17 railroads insidiously tried to keep away from the jury  
18 because they feel that the fact that the FELA is the sole  
19 remedy for railroad employees somehow prejudices them, even  
20 though it is true.

21 Similarly here, the tax effect on the award is correct  
22 that the Court's position that the award will be pretaxed,  
23 won't be taxed, won't be true, again, doesn't have any  
24 relevance to the jury in terms of rendering its award.

25 Our position is that if they want to keep out in FELA

1 cases the fact the FELA is the sole remedy, the court  
2 permitted that because of potential prejudice, we think the  
3 tax consequences (inaudible) can have that same effect. It  
4 should not be mentioned one way or the other.

5 THE COURT: All right. I hope we are not going to  
6 have argument on every one of my rulings here. I am standing  
7 by my ruling.

8 You can have a member of a jury influence other jurors  
9 indicating that they think and understand this is taxable.  
10 It clears that up. I think there is good authority for when  
11 requested, an instruction will be given on the  
12 non-taxability.

13 Moving on. Preclude reference to absence of parties and  
14 witnesses. That is unopposed and granted.

15 No. 7 is preclude reference to preexisting conditions.  
16 Preexisting medical conditions are admissible where evidence  
17 of prior medical conditions relate to a medical condition  
18 treated in connection with injuries sustained in the  
19 derailment. Amtrak in its response argued that plaintiff has  
20 both prior and subsequent medical issues and that medical  
21 records are admissible in evidence.

22 I think actually in this pleading Amtrak indicated medical  
23 records are not admissible. I am sure that was a  
24 typographical error.

25 The Court will reserve ruling on this because any evidence

1 of injury or health issues and the symptoms associated with  
2 them must have some relevance to the medical conditions and  
3 diagnoses arising from the derailment.

4 Amtrak in their response does not elaborate on the  
5 connection that either the preexisting conditions or the  
6 subsequent pedestrian accident had to the derailment  
7 injuries. It would be helpful to me before this is raised in  
8 trial for you to just briefly describe in what way these  
9 two -- the preexisting and the subsequent pedestrian  
10 accident.

11 MR. YATES: Yes, Your Honor. I can address that.  
12 Mr. Bonventre may have something to add.

13 The first one has to do with the (inaudible). We  
14 anticipate that the evidence plaintiff is going to present  
15 will include evidence of physical and cognitive fatigue that  
16 they will attempt to attribute to the derailment. The fact  
17 she was reporting the same, similar symptoms to her primary  
18 care doctor long before the accident, we believe, is  
19 relevant.

20 We also understand the evidence will include some ongoing  
21 pain and subjective dysfunction with her sort of back and  
22 neck area stemming from her clavicle fracture, which is  
23 related to the derailment. Being struck by a truck while  
24 presenting for treatment for neck and back pain, things of  
25 that nature, we also believe is relevant to the ongoing



1 physical sequelae we think she's going to present at trial.

2 MR. LEVY: This is Scott Levy for plaintiff.

3 Plaintiff has no problem with the defendant looking into  
4 those two particular issues, fatigue and back and neck pain.  
5 There are no other preexisting conditions that have been  
6 identified by defendant, and we would just keep it at those  
7 two preexisting conditions.

8 THE COURT: All right. You have heard how the Court  
9 views this. You indicated that you recognize that there can  
10 be some relevance here. This is sort of conditionally  
11 denied. If something comes up during trial in which you feel  
12 there has been some attempt to introduce some health care  
13 information that has no relation, you can alert the Court and  
14 we will take it up.

15 With regard to the medical records mentioned here, and it  
16 comes up in other matters, this Court's position is that  
17 medical records are generally not wholesale admitted into  
18 evidence, but come through the examination of a health care  
19 provider.

20 Plaintiff in its response to Amtrak's supplemental motion  
21 seeks admission of medical records from Dr. Crossen. Both  
22 parties are -- I have looked at the pretrial order. Both  
23 parties are seeking the admission of medical records. The  
24 Court certainly will allow that.

25 My rulings in the past remain here. I don't allow just a

1 dumping of medical records without some health care provider  
2 providing information because that can be a 403 problem,  
3 cause confusion with the jury, they are not medical experts  
4 and so forth. There are -- yet Amtrak has objected to some  
5 of the medical records, however, in the pretrial order.  
6 Maybe you can elaborate on the reason for the objection.

7 MR. YATES: Your Honor, the only medical record that  
8 I believe we have objected to is Dr. Crossen's untimely  
9 expert report. I believe we have stipulated to the records  
10 the plaintiff identified in their exhibits and we also  
11 proposed the same. Separately, we will work with plaintiff  
12 to have an identified universe of records for trial.

13 I think the Court has correctly identified that both  
14 parties are seeking the admission of the records here, and in  
15 their response to our motion on Dr. Crossen's report, they  
16 acknowledge medical records are admissible, which they are.  
17 Hopefully that answers Your Honor's questions.

18 THE COURT: I think it does. I was going to get to  
19 Crossen at the end because it was the supplemental.

20 The Court's view with respect to Crossen, I am not sure  
21 there is a dispute here, a report itself is not admissible.  
22 He can provide testimony up to his last visit with plaintiff.  
23 Rule 26 requires supplemental discovery production when there  
24 are visits with health care providers after the end of  
25 discovery because there is an ongoing obligation there.

1 Dr. Crossen will be allowed to testify concerning all of  
2 his opinions. The report itself, just as expert reports are  
3 not admitted, his findings, observations and so forth will  
4 all come through his testimony.

5 Does Amtrak have any additional problem with that?

6 MR. BONVENTRE: Yes, Judge. Our judgment of  
7 Dr. Crossen is not that he happened to see her except for a  
8 gap of years. The report is really in the nature of a  
9 medical expert report. It is not in the nature of I saw the  
10 patient and observed X, Y and Z. It is in the nature of an  
11 expert report served way beyond the close of discovery.  
12 That's our objection, Your Honor. Obviously, the report does  
13 not come in, the (inaudible) with the Court. The problem is  
14 it is not just another visit in which Dr. Crossen comments on  
15 his additional examination. It is an absolute full-blown  
16 expert report, which should be precluded.

17 THE COURT: Did I not say it was not coming into  
18 evidence, the report; did you not hear that?

19 MR. BONVENTRE: I am talking about his opinion  
20 generally reflected in the report, not the report itself. I  
21 agree with the Court on that.

22 THE COURT: His opinions can come in with respect to  
23 opinions formed during treatment.

24 MR. YATES: Your Honor, may I briefly add a couple of  
25 points? I understand the Court's ruling with respect to the

1     admissibility of the report itself. However, we are  
2     concerned about at least a couple of items in that report  
3     that Dr. Crossen apparently gleaned from his last interview  
4     with the plaintiff. I would point out, everything in the  
5     last report was strictly evaluation because, by law, he is  
6     not allowed to provide treatment to Ms. Torjusen while she's  
7     in Cairo and he's in Oregon. This is purely for evaluation.

8             Within that, he relates the content of the article which  
9     Ms. Torjusen claims to have written about the Amtrak  
10    derailment, including its causes and consequences.  
11    Plaintiff, I think, has correctly acknowledged in their  
12    response that none of that is admissible. Dr. Crossen  
13    shouldn't be allowed to put that in front of the jury by  
14    testifying to what Ms. Torjusen told him.

15            Secondarily, there is reference in the report to  
16    Ms. Torjusen going to the derailment site, drinking a number  
17    of shots of vodka that corresponds to the fatalities in the  
18    accident. We also believe under 403 and hearsay and several  
19    other reasons, that that testimony should not be admissible  
20    consistent with the Court's ruling on these types of issues  
21    in prior cases.

22            MR. PETRU: This is Anthony Petru. I am going to  
23    ask -- Mr. Yates is making reference to matters I am not  
24    familiar with in terms of the Court making rulings in prior  
25    cases. I don't know what he is talking about, so if I could

1 have some light on what that references so I can respond in  
2 context.

3 THE COURT: Let me say that I am not exactly sure  
4 which particular rulings. Each case and each evidentiary  
5 issue stands on it own and will be ruled on on its own.

6 I do not find at this point that it is likely that I would  
7 sustain an objection if there was evidence that she went back  
8 to the scene of the accident and she drank and so forth.  
9 This is part of her story, which she is permitted to tell. I  
10 don't see a 403 problem. It is part of her experience.

11 MR. PETRU: That satisfies what I was going to say.

12 THE COURT: What the -- if a psychologist recounts  
13 that same thing and that bears upon how he views her current  
14 mental state and future needs and so forth, I think that is  
15 going to be permitted.

16 MR. PETRU: Thank you, Your Honor.

17 THE COURT: No. 8 is preclude evidence of defendant's  
18 good character. I have already addressed the issue here with  
19 respect to -- that there is not going to be evidence of  
20 character, but there will be a stipulation with regard to the  
21 payment of medical bills. Again, assuming that all medical  
22 bills have been paid.

23 No. 10 is preclude admission of medical records other than  
24 through the health care providers. I have already indicated  
25 to you what my approach is to that. The parties have already

1 stipulated here with respect to many medical records, and I  
2 expect you can do some meeting and conferring and resolve.  
3 Where they are unresolved, you can bring it to my attention  
4 during trial that there is an issue of medical records.

5 Defendant's No. 1 is preclude evidence not produced in  
6 discovery. Plaintiff is arguing I should reserve ruling on  
7 these. I agree. The plaintiffs have a motion similar to  
8 this, which was unopposed and granted. Having said that,  
9 though, whether an opinion offered by an expert is beyond a  
10 report is a matter that needs to be addressed when being  
11 offered. Opinions that are disclosed may have assumptions or  
12 support opinions that formulate the general opinion. The  
13 Court just has to reserve ruling should an objection come up  
14 that there is an opinion, for example, being expressed by  
15 someone that was not supported in the record. Although there  
16 are no expert witnesses in this case, are there? All the  
17 so-called experts are just health care providers, treatment  
18 providers.

19 MR. LEVY: Correct, Your Honor.

20 THE COURT: I will move on to No. 2. Preclude  
21 inflammatory questions, statements and arguments attempting  
22 to disparage Amtrak. I believe and agree this is too vague.  
23 I will rule on any objections when made. Of course, the need  
24 to avoid these things applies to both parties.

25 Three, preclude cumulative fact witnesses. I did not see

1 the list of lay witnesses as overly cumulative here. There  
2 should be some restraint in the two parents not providing  
3 extensive testimony on the effects of this on their daughter  
4 unless Amtrak impeaches the first to give testimony. I am  
5 not going to preclude one of the parents from testifying. I  
6 am just simply saying if you don't -- if you have the first  
7 parent who gives extensive testimony, we don't need to have  
8 total redundancy unless Amtrak is attempting to impeach that  
9 first parent.

10 Then, the rescuer and the friend, I don't see either of  
11 those as running afoul of 403. The local rule provides  
12 ordinarily a party shall be restricted to one expert on a  
13 particular subject. Again, we don't have experts here. What  
14 we do have is multiple psychologists or mental health  
15 treatment providers here, and it seems to me there is the  
16 potential for a lot of overlap and redundancy here.  
17 Certainly, to the extent that each of these health care  
18 providers are providing testimony concerning their treatment,  
19 that certainly is very appropriate.

20 When talking about future needs and so forth, I just am  
21 asking here for plaintiff's counsel to not have a lot of  
22 repetitive testimony. Usually it is good to put your best  
23 health care provider on diagnoses and treatment and prognosis  
24 and so forth first to -- and then as subsequent psychologists  
25 are called to testify, again, there can be some exercise of

1 discretion here.

2 I don't know if I have helped anyone, but I think that  
3 what we have here is multiple psychologists treating her over  
4 different periods of time, and they will be allowed to  
5 testify concerning that.

6 MR. LEVY: Thank you.

7 THE COURT: No. 4 is limit Kevin Jeffers' testimony  
8 to photographs he took within the experience of helping  
9 plaintiff at the scene. I am going to reserve ruling on  
10 this. It would seem to me that certainly he is relevant to  
11 the magnitude of the aftermath of this derailment. He became  
12 personally involved in helping plaintiff in this case. I  
13 would say that I don't think we should see more than roughly  
14 20 minutes of testimony from him regarding all of that.  
15 Certainly it is relevant to damages.

16 The photographs that he took, again, I would like a  
17 stipulation or at least an agreement reached prior to the  
18 first trial day on what photographs will be used to inform  
19 the jury generally of this derailment in which liability has  
20 been admitted and photographs depicting that. Again, in  
21 previous cases I have allowed, and encouraged really, a  
22 stipulation to be reached with respect to the manner of the  
23 derailment. That is, the speed, the curve, speed limit, that  
24 the train derailed and showing the aftermath. These are --  
25 this is relevant to her damages claim. There is going to be



1 403 limitations on just how much. I am just encouraging the  
2 lawyers to work this out through stipulation and agree to  
3 what photographs will be used.

4 MR. LEVY: Your Honor, may I be heard on this one?

5 THE COURT: Yes.

6 MR. LEVY: This is Scott Levy for plaintiff.

7 Regarding Mr. Jeffers, plaintiff would like to talk to  
8 Mr. Jeffers about why he was on the scene just to lay the  
9 foundation for what he was doing there, and then describe how  
10 it is that he came to find Ms. Torjusen and his interactions  
11 with her. I am a little concerned -- he had extensive  
12 interactions with her, both initially when he found her and  
13 stayed with her and assisted her, and then a short period of  
14 time afterward when she was being triaged and there were  
15 phone calls with Ms. Torjusen's family. I believe -- I am a  
16 little concerned that 20 minutes may be a little bit short to  
17 be able to explore the full interactions between Mr. Jeffers  
18 and Ms. Torjusen as well as kind of the background setting  
19 and the context of what he was doing on the scene.

20 THE COURT: That's fair for you to jump in and  
21 express concern about the 20 minutes. It may seem that is  
22 somewhat arbitrary. I am not inexperienced in terms of these  
23 things. I am not holding you to 20 minutes. I threw that  
24 out. I don't want an extensive discussion about the -- all  
25 the scene, all the different people. At some point it

1 becomes a matter of 403 concern. I am throwing this out so  
2 that Amtrak doesn't feel like it has to throw in an objection  
3 saying this is going too far. I am certainly going to give  
4 you latitude with respect to that. Twenty minutes may not be  
5 enough. At some point, Amtrak may raise an objection and, of  
6 course, they do so at their peril because if I am not so  
7 persuaded, then it is just going to appear to the jury that  
8 Amtrak is trying to diminish the seriousness of the aftermath  
9 of that derailment.

10 I think I have said enough there.

11 MR. LEVY: Thank you, Your Honor.

12 THE COURT: No. 5 is limit the testimony of treating  
13 physicians to their diagnosis and treatment. I am going to  
14 reserve ruling here. There is presentation. There is  
15 symptoms being called out. There is diagnosis. There is  
16 treatment plan prognosis. These are all things we know are  
17 typical. They are going to be allowed to do that. Of  
18 course, they are not permitted to express opinions that  
19 weren't formed when treating -- arising from their treatment.

20 No. 6 is preclude plaintiff or witness from testifying  
21 about future medical expenses or wage loss. There seems to  
22 be an agreement there is not a wage loss claim here. I  
23 expect the treating health care providers are going to  
24 provide testimony concerning what they feel is needed in  
25 terms of future mental health treatment.

1       Setting aside for a moment the discounted to present value  
2       issue, Amtrak, what is the basis for your objection for a  
3       health care provider that offers testimony? You don't need a  
4       life care planner in order to indicate -- in fact, life care  
5       planners, Amtrak doesn't have much regard for them, at least  
6       based on my experience in the past, and they rely in their  
7       reports on what they learn from the health care providers.  
8       What would be the basis of an objection to one of the  
9       psychologists testifying concerning her need for future  
10      mental health counseling?

11             MR. BONVENTRE: I will go first. The issue is not --  
12      the issue is a question of disclosure. It is a question of  
13      here we are three weeks from trial, and because we don't have  
14      a life care planner or an expert report setting forth in  
15      detail what it is allegedly the plaintiff is going to need in  
16      terms of future treatment, we are left three weeks before  
17      trial to completely guess what the witnesses are going to  
18      say. There has been zero disclosure on that issue.

19             MR. YATES: That is correct, Your Honor. In  
20      Dr. Crossen's last actual treatment note from November of  
21      2018, he ends by talking about how she has a group project  
22      due in class. There has been no disclosure beyond that  
23      about -- there is nothing in there about any future treatment  
24      needs whatsoever. The content of his report is really more  
25      importantly the label. I would respectfully submit it is an

1 expert report because that is the first time where there is  
2 any sort of possible suggestion of additional future  
3 treatment going out into the future.

4 MR. PETRU: Your Honor, if I may respond.

5 THE COURT: Yes.

6 MR. PETRU: There is no secret here that Ms. Torjusen  
7 suffers from a combination of psychological, physical and  
8 cognitive issues, all of which have been disclosed in the  
9 medical records, all of which are available to defendant.  
10 They are fully aware of them. She has TBI, PTSD, adjustment  
11 issues, as well as has been in and out of therapy over the  
12 last four years or so.

13 I don't have all the medical records in front of me. I am  
14 not going to parse through them. To suggest or imply that  
15 Amtrak does not know or not expect that she will require and  
16 would benefit -- more importantly, would benefit from  
17 treatment prospectively is, I think, disingenuous. I think  
18 that is replete through all the records. Dr. Crossen has  
19 expressed the same need as others have in the past, that she  
20 does need it. I would suggest that assuming that they don't  
21 know that is -- I am trying to be careful here. That is not  
22 reading the same medical records we are reading. They know  
23 that. They know that.

24 MR. BONVENTRE: I apologize.

25 MR. PETRU: What we don't have here is a clear and

1 specific outline that in ten years or 15 years or 20 years,  
2 she's going to need this or that or something else or need  
3 access to the care. If we had that kind of prospective  
4 five-, ten-, 15-, 20-year plan to assume her life was going  
5 to take a certain track, we would have it, but we don't.  
6 What she is, is she's a damaged young lady who has been --  
7 who has continuous damage who will need access to care. I  
8 expect that is what the testimony will be.

9 We might get to a point where it is not specifically  
10 quantified. I don't know exactly what the witnesses are  
11 going to say. We do know what their bills are. We do know  
12 what they have charged for an hour session or  
13 neuropsychological evaluation. Those are historic. Those  
14 are in the records. Those will come forward. It is up to  
15 the jury to make a determination based on the evidence that  
16 they are provided in terms of whether they believe that  
17 Ms. Torjusen would benefit from future medical care. The  
18 elements are there for them. I think under the law that is  
19 all we need to do. That is ultimately a jury determination.

20 THE COURT: I don't want to take further argument on  
21 this. A treatment provider, we already went through,  
22 provides diagnosis, treatment plan and prognosis. I am sure  
23 that Amtrak had the opportunity to take the deposition of  
24 these health care providers and ask the question about what  
25 are her future needs and so forth. This falls within

1 opinions formed while treating, whether a health care  
2 provider -- that also --

3 MR. BONVENTRE: Can I be heard on this? It is  
4 literally trial by ambush. It is not the defendant's job to  
5 try to discern and guess what the plaintiff's expert is going  
6 to say about future treatment. Counsel just said he,  
7 quote/unquote, expects. Counsel doesn't even know what these  
8 witnesses are going to say. How is defendant possibly  
9 supposed to prepare for cross-examination if plaintiff's  
10 counsel, who is going to call the witness, doesn't even know  
11 what they are going to say? We are not on notice in any way,  
12 shape or form about what any future treatment is going to be.  
13 It is trial by ambush, and we object.

14 THE COURT: You just explained why I think it is  
15 going to be admissible. Now, in any specific and particular  
16 health care provider, you can move to strike testimony if you  
17 think that testimony was inconsistent with what the medical  
18 records would support in terms of their opinions about what  
19 her needs are in the future and so forth. As I said, it is  
20 not trial by ambush. I assume Amtrak is taking the  
21 deposition of these health care providers. Those are  
22 standard questions to ask of a treatment provider when going  
23 through the presentation, complaints, diagnosis, treatment  
24 and prognosis.

25 We will have to wait and see what precisely comes out

1 there. You can see my general ruling here is I am not going  
2 to grant the motion to preclude speaking about future needs.

3 The quantification, that's a different question. With  
4 regard to the discount to present value, should they offer  
5 testimony concerning their hourly rate and what might happen  
6 in the future, typically, this discount to present value  
7 comes from an economist. Neither party has hired an  
8 economist. When there is no evidence with regard to discount  
9 to present value, the jury doesn't get an instruction on it.

10 I might add, in my experience the difference between the  
11 discount to present value and the present number is usually  
12 very little difference because the conservative investment  
13 rate of return is -- tracks very closely to the inflation  
14 rate.

15 There is not going to be apparently an economist. There  
16 won't be an instruction, but that does not preclude evidence  
17 coming in by itself about future medical expenses.

18 No. 7 is to preclude plaintiff's counsel from using  
19 anchoring tactics in opening statement, closing argument.  
20 Actually, I noted Amtrak characterizes it as "opening  
21 argument." Of course, it is supposed to be an opening  
22 statement. It seems to me this rule is honored more than it  
23 is breached any more than it is in its observance. I have  
24 become in my old age more patient with lawyers who are  
25 violating the rule because you can see a lot of argument

1 coming out in the opening statement. But if it becomes too  
2 significant and counsel for the other side objects and says:  
3 This is argument, Your Honor. I am going to say: It is.  
4 Your objection is sustained.

5 Let me finish. With respect to the anchoring part, I have  
6 not precluded anchoring. I don't endorse those courts that  
7 think it is improper. I do not think it is improper. It is  
8 something that each side can do. It is perfectly, in my  
9 opinion, appropriate for counsel to make a suggestion to the  
10 jury. That's what it should be. It is argument. It should  
11 be a suggestion. So-called anchoring, this anchoring motion  
12 is denied.

13 No. 8, preclude evidence of Amtrak's liability. I have  
14 already addressed this, I think, sufficiently, with what I  
15 expect the parties to get together and do with regard to  
16 photographs and stipulation.

17 Preclude media reports is No. 9 regarding the derailment  
18 or the return to service. As I have done in earlier cases, I  
19 am going to reserve ruling on this. As a general matter,  
20 there are 402 and 403 concerns. However, if some media  
21 coverage has some influence on plaintiff's mental state of  
22 any kind, it may pass both evidentiary rules, but I want to  
23 know ahead of time if plaintiff intends to offer evidence of  
24 media coverage, and I will take it up outside the presence of  
25 the jury.



1 MR. PETRU: If I may give the Court a heads up.  
2 Ms. Torjusen is influenced by media reports of train  
3 accidents, of this particular incident. It has altered her  
4 life so significantly. We shared with counsel a school  
5 project that she wrote analyzing it, criticizing the  
6 incident, talking about it on a personal level. Insofar as  
7 the Court earlier said she has a story to tell, part of the  
8 story is the impact that she has experienced when she sees  
9 and reads and hears about train accidents, including media on  
10 this particular incident. In that context, it will be the  
11 subject of examination. I am giving the Court a heads up on  
12 it.

13 THE COURT: I expected from what I read that was  
14 going to be the case here. That's different from actually  
15 having video from KING 5 TV or something like that. And the  
16 parties have already agreed that her, whatever it was,  
17 28-page story and criticism of Amtrak was not going to come  
18 in. Again, if she wants to testify, she intends to testify  
19 that she was watching the news the other night and there was  
20 a derailment in the Midwest someplace and caused her to  
21 suffer a lot of emotional harm, she found herself  
22 uncontrollably crying, obviously I don't know what you are  
23 going to be alluding to, I am using this as an example that's  
24 relevant.

25 MR. PETRU: That's my context, Your Honor. Their

1 No. 11 is the exact same issue. We will get to that.

2 THE COURT: No. 10 is exclude reference to  
3 congressional testimony of the FAST Act. That is unopposed  
4 and granted.

5 Exclude evidence of other derailments. Same answer I just  
6 gave here a moment ago. If she becomes aware of some other  
7 prior derailment or collision that caused her to suffer some  
8 emotional reaction, she can testify to that.

9 No. 12, exclude reference to the NTSB report. Plaintiff  
10 is opposed to this. It is not clear to me why. I have  
11 excluded it in every other case.

12 MR. PETRU: There is a legal distinction between the  
13 conclusions that are drawn by the report being precluded from  
14 admission. We understand. We have handled railroad cases  
15 for many years. The distinction is the factual findings in  
16 the NTSB report. Based on our read of the section and case  
17 law, which is cited in our brief, those factual findings are  
18 admissible and can be admitted.

19 THE COURT: Where liability has been admitted, you  
20 are saying? Where liability has been admitted into evidence,  
21 the factual findings of the NTSB?

22 MR. PETRU: I didn't mean to go that far. I meant to  
23 say the factual findings, if relevant, can be admitted.  
24 Here, I think the Court's suggestion that we get together  
25 with defendant and outline the facts, the speed, curve,

1 everything else that is contained within the report, we know  
2 that, in the form of a stipulation and what the jury will  
3 hear about the incident itself probably this renders this  
4 motion in limine moot. If we have an issue with agreeing  
5 upon the facts the jury would hear, we might have to revisit  
6 it. I believe based on our read of some other transcripts of  
7 the agreements, and Mr. Yates and Mr. Bonventre can correct  
8 me if I am wrong, there was an agreement as to what would be  
9 presented previously. I think this will be moot. I would  
10 ask the Court just reserve in case we don't reach that  
11 agreement. I would like to see the language which was  
12 reached previously, which we haven't seen yet.

13 MR. LEVY: There are a couple of photographs that  
14 were taken from the NTSB report. That's primarily why we  
15 objected to this particular MIL.

16 THE COURT: I don't care what the source of the  
17 photos of the aftermath of the derailment, NTSB or otherwise.  
18 Yes, I agree that you can have some photographs. You just  
19 need to share them with Amtrak. I assume they'll agree if it  
20 is an accurate depiction of what was seen there immediately  
21 after the accident. I think we are fine here. We are on the  
22 same page.

23 No. 13 is preclude reference to fatalities in the  
24 derailment. I have precluded this in prior trials where it  
25 has no particular relevance except that if slightly relevant,

1 there is no serious 403 problem. On the other hand, if she's  
2 testifying that she observed bodies that appeared to be  
3 lifeless, that is part of her damages then she can testify to  
4 that. There is not going to be any evidence coming in that  
5 says the number, independent of what she observed, because I  
6 am concerned that it will run afoul of 403, even if it has  
7 some minor relevance.

8 MR. PETRU: If I may revisit. The Court recognized  
9 earlier, and that is that Ms. Torjusen has a habit of  
10 visiting the scene of the incident on its anniversary. She  
11 drinks three shots of vodka in honor of the people who died.  
12 You earlier indicated that is part of her experience and how  
13 it impacts her. In that context, I would ask the Court to  
14 consider allowing that testimony, which is part of her  
15 experience.

16 THE COURT: If she said she saw someone she believed  
17 was dead at the accident and she goes back and has a toast to  
18 that person, I think it needs to be in that context. Needs  
19 to be in furtherance of what she personally observed. Again,  
20 I said it has some relevance, 403 becomes a problem. I would  
21 not sustain an objection if she testified that when she was  
22 there, she saw a lifeless body over there and she knew -- I  
23 guess, she learned -- if she says she learned, indeed, that  
24 there were a couple of dead bodies there, she can -- she goes  
25 back every year to toast, I will probably allow that.

1 MR. PETRU: Thank you, Your Honor.

2 THE COURT: It is directly relevant to her personal  
3 story and experience.

4 MR. BONVENTRE: Your Honor, I will address that at  
5 the time of trial.

6 THE COURT: You can. I am just telling you what I am  
7 likely to do and what is helpful. I probably do more on  
8 motions in limine -- we spent quite a bit of time here --  
9 than most trial judges do. They just say "granted" or  
10 "denied." I want the parties to have a good idea where I am  
11 at on these things.

12 MR. BONVENTRE: I appreciate it, Judge. Thank you  
13 very much.

14 THE COURT: The supplemental -- well, 14 through 20,  
15 those were all unopposed and granted.

16 Going to No. 15, that is Dr. Crossen. I think that I have  
17 addressed that already sufficiently.

18 The article that plaintiff wrote also is agreed to be  
19 excluded, not offered. That motion is granted.

20 That covers the motions in limine.

21 With regard to the trial, I think five days is what was  
22 the advertised amount here of days that we need. Does that  
23 still sound right? When I look at the number of witnesses,  
24 which are all pretty much the same witnesses, it seems to me  
25 that five days would clearly be enough time to have this case

1 presented to a jury.

2 MR. PETRU: I like the Court's phrasing, I think that  
3 is as advertised and that has not changed.

4 THE COURT: Trial will start on a Tuesday at 9:00.  
5 Our trial day consists of the hours between 9:00 and 4:30  
6 with an hour and a half for lunch between 12:00 and 1:30,  
7 mid-morning, mid-afternoon break of 15 minutes. Those tend  
8 to -- the morning break tends to come at around 10:30, the  
9 afternoon around 3:00. That can vary based on where we are  
10 with a witness or whether I have an objection that has been  
11 lodged and I want to take that up outside the presence of the  
12 jury. That is the general trial day.

13 I ask the parties to be sharing on the eve of each trial  
14 day the witnesses who are expected to appear the following  
15 day and the exhibits that will be expected to be presented.

16 With respect to the jury selection process, I have had  
17 emailed out to you my voir dire questions. The process  
18 begins with -- again, this will be in person. At the front  
19 of the room will be an easel with a card on it that asks each  
20 juror, in numerical sequence, to introduce themselves to one  
21 another and to us by identifying where they live, what their  
22 occupation is, who their family generally consists of, what  
23 their personal interests are and hobbies. And once they have  
24 done that, and we will have -- we will probably have about 26  
25 jurors typically, somewhere close to that.

1 After they introduce themselves, I will go through my  
2 questions that I have there. When I have completed that,  
3 then each side will have 20 minutes to take up their  
4 voir dire questions. I have reviewed the voir dire questions  
5 suggested. I have no objection to those.

6 At the completion of counsel's voir dire, then I will take  
7 up the excusing of jurors for cause.

8 We tried to eliminate before they get here where there are  
9 hardships. Invariably, there will be three or four people  
10 who have indicated that they have a family member they have  
11 to care for, they have a trip they bought tickets for, that  
12 sort of thing. I am generous with respect to allowing people  
13 to assert hardship through some sort of conflict like I have  
14 just described. We should have plenty of jurors available to  
15 us with 26 because there will be an eight-person jury.

16 The peremptory challenges are three to each side. You  
17 will exercise your peremptory challenges, and after you have  
18 done so, share with the other side, which means that you may  
19 end up finding that you have peremptorily challenged one or  
20 more of the same prospective jurors. I ask you to show it to  
21 one another before it is handed up to the bench so I can ask  
22 you if this is the jury you selected.

23 Any question about jury selection?

24 MR. LEVY: No, Your Honor.

25 MR. BONVENTRE: No, Your Honor.

1 THE COURT: I believe I have covered all the matters  
2 that I want. The preliminary jury instructions are also  
3 emailed out to you. I incorporated a statement of the case  
4 that the parties have agreed to.

5 Any --

6 MR. PETRU: I do have a question for the Court. I  
7 believe that one or maybe -- maybe a couple three, I am not  
8 sure of the exact number, of our witnesses might need to  
9 testify by video conference. I understand the Court has the  
10 facility to do that with the jury. Am I correct?

11 THE COURT: We do.

12 MR. PETRU: Good. Okay.

13 MR. BONVENTRE: Judge, I don't know if counsel is  
14 done.

15 MR. PETRU: Counsel is done, yes.

16 MR. BONVENTRE: That was one of the issues that I was  
17 going to raise over here from Amtrak, which is my  
18 understanding is the plaintiff is currently in Egypt. We  
19 have requested the plaintiff appear for her trial live. We  
20 have grave concern about people hearing by video since COVID  
21 is no longer an issue. I think it is an extraordinary matter  
22 for people not to appear live. COVID was a reason. We have  
23 all done in the past medical witnesses in which we have done  
24 video depositions in which the lawyers were present with the  
25 witnesses. We would object to anyone being present via



1 video, and particularly object to the plaintiff. Or can we  
2 hear is the plaintiff going to be appearing at the trial  
3 live?

4 MR. PETRU: Plaintiff will be here live. We will try  
5 to reduce the number of witnesses who need to appear  
6 remotely. I believe the plaintiff has the right to do that  
7 in certain circumstances. We understand counsel's position.  
8 Also with the individuals involved, try to make that as  
9 limited as possible.

10 THE COURT: Depositions are permissible where the  
11 witness is unavailable. Actually appearing usually comes by  
12 way of stipulation. Seems to me the plaintiff -- Amtrak is  
13 not stipulating to plaintiff appearing through video  
14 conferencing.

15 MR. PETRU: Plaintiff will be live. Plaintiff will  
16 be live.

17 THE COURT: I encourage -- especially with health  
18 care providers and so forth, I encourage those to be worked  
19 out to appear because pre-COVID that was routinely done in  
20 order to save expenses and efficiency, and there is no -- it  
21 works fine and we have the ability to do that here. I will  
22 ask the parties to work on that by way of agreement. If  
23 there is no agreement, take it up with me, relative to having  
24 a conference call.

25 MR. PETRU: Thank you, Your Honor.

1 THE COURT: Anything else?

2 MR. PETRU: I do have something else, Your Honor.  
3 The Court moved the -- another case we have from this  
4 particular derailment, Amanda Ularick, we got notice from the  
5 Court that there was a trial date available on June 10th, I  
6 believe, and nothing until the fall. Because of our  
7 schedules and counsels' schedules, we were the first date  
8 after the fall that we were able to find was in February,  
9 which I think we have locked in with the Court.

10 Is there any way -- without breaching attorney/client  
11 communication, I must share the client was very frustrated by  
12 a year-long delay in her getting resolution for her case, her  
13 damages, her issues. Is there any way the Court has  
14 additional dates that have opened perhaps in July or August  
15 that we might be able to work on with counsel?

16 THE COURT: I don't believe there is any in July. As  
17 you well can imagine, with COVID, we had a lot of backed up  
18 cases. We have cases scheduled two and three deep and  
19 probably even the one you are talking about there. We --  
20 Dara can talk with you about finding someplace sooner than  
21 February, if possible. Keep in mind, again, you are going --  
22 any trial date set, you are going to be set with other  
23 trials, and I generally go with the lowest number.

24 MR. PETRU: I fully appreciate that. Like the Court,  
25 we have many cases. O'Hare airport is calm compared to our

1 trial calendar these days. I am sure the Court's is just as  
2 perplexing and frustrating. For an individual plaintiff who  
3 is not familiar with the system and hasn't had these  
4 experiences, on her behalf I told her I would bring it up  
5 with you, and hopefully we'll be able to find another date.  
6 We will talk to her. Appreciate it.

7 THE COURT: All right. Amtrak, by the way, appears  
8 prominently in my trial calendar. They have showed up about  
9 every other week. Amtrak has demonstrated, along with  
10 plaintiff, they do know how to settle cases. Certainly this  
11 case could settle between now and the trial date. This  
12 pretrial conference was earlier than normal before trial.

13 Are the parties way far apart that further mediation  
14 might -- there is time for that?

15 MR. PETRU: Your Honor, I don't think mediation -- we  
16 have been around a long time negotiating with Amtrak. We are  
17 far apart. We have shared with the claims representative  
18 some of the perspectives that may not have been considered in  
19 their evaluation. If the case has a chance of settling, I  
20 think it will happen directly between the parties. I don't  
21 think mediation will be of any help.

22 THE COURT: All right. Well, if there is nothing  
23 else, we'll be in recess. I have another hearing that I am  
24 late for.

25 MR. PETRU: Thank you, Your Honor.

1 (The proceedings adjourned.)

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4 C E R T I F I C A T E

5  
6  
7 I certify that the foregoing is a correct transcript from  
8 the record of proceedings in the above-entitled matter.

9  
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11  
12 /s/ *Angela Nicolavo*

13 ANGELA NICOLAVO  
14 COURT REPORTER  
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